83-683



IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

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GERALD BANKSTON,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

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# RESPONSE OF RESPONDENT STATE OF FLORIDA

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# IN OPPOSITION TO PETITION FOR CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

WHETHER THE PETITIONER HAS RAISED AN UNRESOLVED SUBSTANTIAL QUESTION OF FEDERAL LAW WARRANTING REVIEW BY THIS HONORABLE COURT?

## PARTIES TO THE PROCEEDING

Respondent accepts the designations of parties appearing on the face of the Petition.

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**STATUTE**

## PRELIMINARY STATEMENT

Respondent accepts that portion of the Petition for Writ of Certiorari setting forth the opinion in the court below and the Constitutional and Statutory Provisions Involved found on pages 1, 4 and 5 of the Petition.

## JURISDICTION

The Respondent cannot accept Petitioner's assertion that this court's jurisdiction has been properly invoked pursuant to 28 U.S.C. §1257(3), in that the Petitioner has failed to present an unanswered substantial federal question entitling him to this court's exercise of its jurisdiction. Specifically, Petitioner's QUESTION I, subparts A., B., and C., have all finally been resolved by this Honorable Court's opinion of United States v. Place, __U.S.__, 103 S.Ct. 2637 (1983), which to a large extent resolves any lingering inquiries on the framed issues, post, Florida v. Royer, 460 U.S.___, 103 S.Ct. 1319 (1983). Indeed, in some respects the majority opinion in United States v. Place, supra, can be seen as the logical successor of the plurality

opinion in Florida v. Royer, supra. See 103 S.Ct. at 2648 (BRENNAN, J., concurring in result).

Petitioner's framed QUESTION II totally fails to present an unresolved substantial federal question as, beyond rational argument to the contrary, law enforcement officers under Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2nd 889 (1968), and its progeny, bear the burden of articulating reasonable suspicion in order to justify the temporary detention of any citizen for further investigation of suspected criminal activity. Petitioner suggests that the ruling of the lower court in the case sub judice is in conflict with the principles of Terry and its progeny, in that the instant decision "...reliev[es] the State of Florida of its burden to es-

tablish reasonable suspicion in order to justify detention of a person and his hand-held luggage". See Petitioner's Brief, p. ii.

Petitioner boldly asserts such an alleged conflict despite a finding by the District Court of Appeal of Florida, Third District, that there "...were...more than sufficient [facts] to engender the founded suspicion of criminal conduct which was required to justify [appellant's] detention". See State v. Bankston, 435 So.2d 269 (Fla. 3d DCA 1983) at 270, and n. 4.

As the instant Petition fails to raise any unresolved substantial federal question justifying the invocation of jursidiction pursuant to 28 U.S.C. §1257 (3), the granting of this Honorable Court's

most gracious writ is both unnecessary and unwarranted.

## STATEMENT OF THE CASE AND FACTS

The Respondent does not accept the Statement of the Facts as presented by the Petitioner and would tender the following facts as set forth by the District Court of Appeal of Florida, Third District, in its opinion of State v. Bankston, 435 So.2d 269 (Fla. 3d DCA 1983);

> "...two plainclothes narcotics officers, Johnson and Dozier, became interested in Bankston and his companion, Peterson, when they appeared 'extremely nervous' in the airport. When they 'approached' the appellee, ...as he was nearing his departure date, and asked for his ticket and identification, Bankston voluntarily complied. The names on the two documents did not match. Johnson then asked permission to look inside a suit bag he was carrying. When the

defendant asked him what he was after, Johnson stated he and his partner were narcotics officers, looking for drugs. Bankston at once became faint and asked to sit down. After he was taken to a nearby seating area, the defendant then asked 'if I have something, why don't you let me flush it down the john?, to which Johnson responded that if all he had was a 'head stash, that we would indeed likely allow' him to do so. At that point, Bankston was informed he was being 'detained.'

He and Peterson were again asked to consent to a search of their check and carry-on baggage. Although Peterson agreed, Bankston did not, and Johnson, as he indicated, went to secure a narcotics dog from its pen on the apron of the airport. When the dog arrived some 5-15 minutes later, he alerted on the suit bag which had been moved a foot or two away from Bankston to accommodate the sniff. Based upon the probable cause which had thus arisen,

> [citations ommitted], the defendant was arrested and a search warrant secured for the bag. When executed, 185 grams of cocaine were found inside. 435 So.2d at 269-270.

In addition to the foregoing facts, the Respondent specifically rejects Petitioner's plenteous characterization of the narcotics detection dog as 'aggressive', 'violent' and 'dangerous', as such characterizations are an overreaching of the facts. See Petitioner's Brief p.p.,i, 21, 23, 24, 25, 26, 28, 30, 31, 37, 52.

## REASONS THE WRIT SHOULD NOT BE GRANTED

In the case sub judice, upon a finding of founded suspicion, the police officers stopped and detained the Petitioner and his travelling companion for the purposes of conducting a limited investigation of criminal narcotics trafficking. When the Petitioner declined a consensual search of his hand-held luggage, the police officers summoned a narcotics detection dog for the purposes of "sniffing" the luggage for narcotics. The total period of detention was between 5 and 15 minutes with Petitioner's hand-held luggage resting on the ground within two feet of the Petitioner.

The Petitioner assails this procedure as being violative of the Fourth and Fourteenth Amendments to the United States Constitution, stoutly arguing such a sniffing

procedure constitutes an impermissible search by state authorities in derogation of the aforementioned amendments. United States v. Place, supra, has held directly contra to Petitioner's suggested argument. Id at 2644 and 2645. See also, United States v. Viera, 644 F.2d 509 (5th Cir. 1981). The Petitioner fails to suggest any valid or substantial argument for the position that this court should now revisit that ruling.

Petitioner also suggests that the temporary and limited detention of a person, upon a finding of articulable and founded suspicion, in order to accomplish the sniffing of the individual's hand-held luggage, constitutes an impermissible seizure within the meaning of the Fourth and Fourteenth Amendments. The Respondent's

rejoinder to such an argument is again grounded in this court's opinion of United States v. Place, supra.

In Place, while the court rejected as impermissible and unreasonable a detention of 90 minutes, the court clearly recognized the concept and constitutional validity of a limited investigative detention of a suspect's person and luggage in his personal custody, on less than probable cause, measured by a Terry-type investigative stop standard:

> In sum, we conclude that when an officer's observations lead him reasonably to believe that a traveler is carrying luggage that contains narcotics, the principles of Terry and its progeny would permit the officer to detain the luggage briefly to investigate

> the circumstances that aroused his suspicion, provided that the investigative detention is properly limited in scope. Id at 2644.

In Florida v. Royer, supra, not only did a plurality of this court suggest that such a limited investigative detention and procedure was constitutionally permissible, but also desirable in balancing the constitutional protections of citizens and the state's legitimate interest in the suppression of narcotics trafficking:

> Third, the State has not touched on the question whether it would have been feasible to investigate the contents of Royer's bags in a more expeditious way. The courts are not strangers to the use of trained dogs to detect the presence of controlled

> substances in luggage. There is no indication here that this means was not feasible and available. If it had been used, Royer and his luggage could have been momentarily detained while this investigative procedure was carried out. Indeed, it may be that no detention at all would have been necessary.
>
> Id at 1328-9

What was clearly and unequivocally intimated by the plurality in Florida v. Royer was expanded upon by the majority in United States v. Place:

> A "canine sniff" by a well-trained narcotics detection dog, however, does not require opening the luggage. It does not expose noncontraband items that otherwise would remain hidden from public view, as does, for example, an officer's rummaging through the contents of the luggage. Thus, the manner in

> which information is obtained through this investigative technique is much less intrusive than a typical search.
>
> * * *
>
> In these respects, the canine sniff is sui generis. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure. Id at 2644

Accordingly, in light of United States v. Place, supra, and Florida v. Royer, supra, no new substantial federal question has been presented by Petitioner in this area via his Petition for Writ of Certiorari.

Finally, Petitioner suggests this Honorable Court should grant review of the state appellate court's opinion in the case sub judice on an alleged ground of a factual deficiency for a finding of founded suspicion, and an additional barebones allegation that the Respondent employed "dangerous, violent, unleashed and aggressive" dogs during the course of the investigative "sniffing" procedure.

As previously pointed out, the state appellate court found at the very least the requisite founded suspicion from the facts of the case and suggested, without deciding, that such facts may have even given rise to full probable cause. State v. Bankston, 435 So.2d at 270; See also n. 4.

The Petitioner's suggestion that the Respondent employed unnecessarily violent and physically dangerous dogs for the sniffing procedure, comes from a resourceful interpretation of the fact that the narcotic detection dog alerted to petitioner's bag by "...scratching [at the bag] with his muzzle down at the bag". T-53. There is nothing in the record to even remotely suggest that the petitioner was ever exposed to unreasonable physical danger by the procedure.

Accordingly, this Honorable Court ought to decline review on the aforementioned grounds.

## CONCLUSION

Based upon the foregoing reasons, ument and citations of authority, the ition for Writ of Certiorari to the strict Court of Appeal of Florida, Third strict, should be denied.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing STATE'S RESPONSE IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI was furnished by depositing in the United States Post Office to Steven D. Ginsburg, 1570 Madruga Avenue, Coral Gables, Florida 33146-3075, Penthouse Suite on this _____ day of January, 1984.

WILLIAM P. THOMAS
Assistant Attorney General